No. 15408

United States Court of Appeals
For the Ninth Circuit

GRACE & CO. (Pacific Coast), a corporation, *Appellant,*

vs.

PITTSBURGH TESTING LABORATORY, a corporation, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG
United States District Judge

APPELLANT'S REPLY BRIEF

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THE ARGUS PRESS, SEATTLE

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REPLY TO APPELLEE'S STATEMENT OF CASE

Appellee's statement reviews extrinsic and parol evidence occurring prior to the time of the written contract.

Such parol evidence boils down to the fact that Mr. Schlauch knew from information furnished him that steel billets of ASTM-A-17/29 ordered from Seattle Foundry were to be "cast in sand molds" or "sand cast" billets and when transmitted by Mr. Gips to appellee's expert, Mr. Clark, the latter erroneously assumed that the specifications called for castings which he signally designated as "cast steel billets." The evidence appears in factual detail on pages 4 and 5 of appellant's opening brief and in proper perspective.

As under the law of the States of California and Washington such parol evidence is inadmissible, incompetent and irrelevant, it has no bearing on the case. Both jurisdictions recognize that parol evidence varying the terms of a written contract should be ignored; that the written terms supersede all prior oral conversations and negotiations; and that the prior conversations and negotiations and oral agreements are merged in the written contract of the parties.

For example, in *El Zarape Tortilla Factory v. Plant Food Corp.,* (Cal. Appeal, 1949) 203 P.(2d) 13, in reversing the trial court, the court on appeal stated:

> "The parol evidence rule is not a rule of evidence. It is one of substantive law. If evidence of conversations and negotiations preceding or contemporaneous to the execution of the writing is admitted it must be ignored. It has no legal force."

Similarly, in *Asbury v. Yakima Milling Co.* (1926) 137 Wash. 203, 242 Pac. 362, the Supreme Court stated:

> "Here we have a writing complete as to every essential of a contract,—parties, subject-matter, price, time and place of delivery. The reference therein to prior conversations is not a reference to them for terms or conditions, but expressly for confirmation of all such conversations which have gone before, and plainly means that all prior parol negotiations and agreements are merged in and limited to the written conditions expressed."

Appellee is absolutely and completely mistaken in making the following statement appearing on page 5 of appellee's brief:

> "Thereafter, on May 16th, appellant's Seattle office sent a letter to Seattle Foundry which purported to be a written contract to supply the bil-

> lets (Ex. 20). In spite of the fact that specifications ASTM-A-17/29 called for the billets to be of rolled or forged steel rather than simply cast steel (R. 25), Seattle Foundry wrote appellant on May 16th stating in part, 'It is our intention to pour these billets in sand molds . . . ' (Ex. 23, Appendix 40). The reference to 'pour in sand molds' obviously meant that the Seattle Foundry, which had no facilities for rolling or forging steel, intended from the outset to supply cast steel billets (R. 484). This fact was accepted by appellant who answered Seattle Foundry's letter of May 23rd advising Seattle Foundry, 'we have no objection to your pouring both sides flat' (Ex. 26)."

The letter of May 16th from appellant to Seattle Foundry (Ex. 20) was the formal contract between appellant and Foundry for the purchase of steel billets of ASTM-A-17/29 specifications (Findings of Fact VIII, R. 86), and not a "purported" contract to supply billets.

The letter from Seattle Foundry to appellant dated May 16th (Ex. 23) did not mean it "intended from the outset to supply cast steel billets." It said "The steel is to be ASTM-A-17/29." One inexperienced in steel upon reading the letter would gain no such impression, but would assume that as the order was for steel billets of ASTM-A-17/29 specifications, one would obtain what one ordered. Actually, until after the order was completed appellant's employees had no knowledge that billets produced by Seattle Foundry would not conform to ASTM-A-17/29 specifications (Findings of Fact XII, R. 95).

The method of producing the steel billets as pro-

posed by Seattle Foundry to meet the ASTM standard for steel billets by pouring them in sand molds *was approved by the testing laboratory hired by appellant, the appellee, before being accepted by appellant,* not on appellant's own responsibility as appellee would have this court believe. The Seattle Foundry letter of May 16 (Ex. 23) was submitted to appellee for expert advice. Mr. Gips read the letter to Mr. Clark who approved the procedure outlined. Appellant's advice to Seattle Foundry that there was no objection to "pour both sides flat" was based upon Mr. Clark's advice. This point is conclusive under the Findings of Fact X appearing as follows:

> "Upon receipt of the aforesaid letter and on May 19, 1952, Mr. Schlauch wrote his San Francisco office enclosing a copy of the aforesaid letter of May 16, 1952. The letter and enclosure came to the attention of Mr. Gips in San Francisco. Foundry's letter of May 16, 1952, was then read by Gips to Mr. Clark over the telephone. *Mr. Clark advised Mr. Gips that their office in San Francisco had contacted their Seattle office and were supplying Pittsburgh's Seattle office with the necessary information to enable them to inspect the material as required, that there was no objection to pouring the billets as proposed by Foundry and that there had been no recent changes or amendments to the ASTM-A-17/29 specifications, confirmed that the analysis for chemical requirements was correct and gave Gips a physical requirement of the specifications for chipping. Clark also advised Gips that the Seattle office of Pittsburgh would inform the Foundry about the chipping requirements or any other requirements. This information and advice from Clark was trans-*

mitted by Gips to Grace in Seattle under letter of May 22, 1952. Grace of Seattle then on May 23 acknowledged Foundry's letter of May 16th and authorized the production procedure outlined by Foundry and approved the chemical requirements as listed by Foundry. . . . '' (R. 94)

The appellee on page 9 of its brief states:

> ''Thereafter, appellant voluntarily refunded the New Zealand Government $21,747.24 of the total price of $37,462.64 paid by New Zealand for the billets.'' (R. 100)

The Findings of Fact XX, R. 100, relied upon by appellee, does not indicate the payment was ''voluntary'' but appellee admits that this sum was paid in settlement, and releases obtained (Admitted Facts, Par. 14, R. 22).

There is no evidence that Mr. Schlauch at any time knew that ''sand cast'' or ''billets cast in sand molds'' would not comply with ASTM-A-17/29 specifications, or that it made any difference in what manner the steel billets of standard specification were to be produced. The trial court adopted Mr. Schlauch's testimony that ''he had no knowledge of the difference between 'cast steel' or 'sand cast' billets as distinguished from forged or rolled billets'' (R. 77).

The misunderstanding of the expert Mr. Clark that the standard specifications for steel billets called for ''cast'' billets is unexplained in the evidence other than by the fact he made an erroneous assumption that the material ordered and to be inspected under the ASTM-A-17/29 specifications called for castings. The trial court in adopting appellant's views in this respect stated:

> "Counsel for plaintiff has taken the position that Pittsburgh in seeking to perform its contract assumed from the beginning that the material to be furnished was cast steel billets instead of billets meeting the specifications ASTM-A-17/29 * * *. The court, * * * agrees that such was the situation."

The established and admitted facts affording a basis for determination of the case may be summarized as follows:

Prior to May 21, 1952, appellant contracted to sell steel billets of ASTM-A-17/29 specifications to the New Zealand Government (Ex. 11). On May 16, 1952, appellant contracted with Seattle Foundry Company of Seattle, Washington, to furnish such billets conforming to the same specifications (Findings of Fact VIII, R. 86, 87).

On May 21, 1952, by an exchange of letters, the appellee contracted with appellant to inspect and certify steel billets ordered from Seattle Foundry to conform to the same specifications (Findings of Fact IX, R. 88-91). The appellee breached that contract by failing to reject steel billets not in conformance with the specifications and in accepting on behalf of appellant and certifying castings as conforming to the specifications (Admitted Facts 15, R. 22-24, Findings of Fact XIV and XVIII, R. 96, 99). The ASTM specifications for steel billets furnished the standard under which appellee as an expert agreed to make inspection and render a certificate of conformity (Findings of Fact XV, R. 96-99).

The billets inspected, passed, approved, accepted and certified to by appellee as conforming to contract speci-

fications, at the time of delivery, had no value other than as scrap steel (Findings of Fact XIV, R. 328, 329).

The appellee was at all times material, in the professional business of inspecting and certifying materials to conform to standard specifications, and in accepting employment with appellant, represented and held itself out as possessing all the knowledge and skill necessary to inspect such steel billets for conformity to said specifications (Admitted Facts 5, R. 19). By its contract (Ex. 21, Ex. 22) appellee agreed to inspect and certify material to appellant's specifications.

Upon the certification by appellee of the castings which it had accepted from Foundry as steel billets conforming to specifications set forth in its contract, appellant paid to Foundry its invoices therefor in the amount of $27,119.16 (Findings of Fact XVI, R. 99).

For its supposed service in making such inspection and certification, appellant paid to appellee $3,151.86 (Findings of Fact XVI, R. 99). Appellant shipped the castings approved and certified by appellee as steel billets conforming to the specifications, to the New Zealand Government at Wellington, and supposing they conformed to the contract of sale, and received prompt payment therefor from the New Zealand Government in the amount of $37,462.64 (Findings of Fact XVII, XX, R. 99, 100). Upon the arrival of such castings, they were rejected by the New Zealand Government (Ex. 42, Findings of Fact XVIII, R. 99). Thereafter, after negotiations, the New Zealand Government submitted an offer of settlement whereby it offered to accept in settlement of its claim against ap-

pellant for breach of contract, the sum of $21,747.24 (Findings of Fact XIX, R. 100).

Appellant submitted to appellee a copy of the proposed terms of settlement with the request that appellee state whether the claim was correct (Findings of Fact XIX, R. 100), to which request appellee in letter of June 9, 1953, stated: "Their claim for adjustment would seem justified" (Ex. 49). The said sum of $21,747.24 was paid to New Zealand in settlement of its claim by appellant on August 11, 1954, after taking and obtaining releases from its liability to New Zealand (Findings of Fact XIX, R. 100).

Upon these established facts the court held that plaintiff, appellant, was entitled to recover from defendant, appellee, for breach of contract only the sum of $3,151.86, the amount paid appellee for its supposed services, instead of appellant's actual loss of $21,747.24.

In proper perspective, the issues in the case on appeal are whether the trial court erred in admitting and considering as relevant the testimony of preliminary negotiations and documentary parol evidence, both of which tend to vary the meaning of the terms of the contract, to show that the parties had in mind the inspection and certification of castings rather than steel billets of the standard ASTM-A-17/29 specifications, and the issue as to the amount of damages, that is, what damages ought appellant recover in the facts and circumstances of the case.

REPLY TO APPELLEE'S ARGUMENT

We recognize the weight and force to be given to the trial court's findings of fact. The rule applies with equal force to both parties. The findings of fact, however, favor appellant's position. The court's holding that plaintiff's only damages were in the amount paid appellee, is but a conclusion not within the rule. The court's real finding as to plaintiff's loss is set forth in Findings of Fact XX, R. 100-102, in which it finds that appellant suffered an out-of-pocket loss in the sum of $14,555.62, plus loss of profits of $7,192.60.

I. The Lower Court Erred in Admitting and Considering as Relevant Parol Evidence in Determination of Appellant's Damages (Specifications of Error No. 1 and No. 2).

See pages 18-24 of appellant's opening brief.

The appellee deals with this subject on page 13 of its brief under the subheading "Evidence as to Contemplation of Parties Admissible on Issue of Damages."

The appellee must concede that the court resorted to parol evidence in determining the state of mind of the parties at the time the contract was made, namely, that inspection and certification was to conform to castings instead of steel billets. The deviation from the true meaning of the terms of the contract as existed in the minds of the parties was based on appellee's mistaken assumption that the specifications called for castings and upon appellant's information that the steel billets were to be "sand cast" or cast in "sand molds." The issue thus presented is simply a ques-

tion as to whether one who breaches a contract may avoid liability which would otherwise result by his declaring he had in mind a meaning different from the natural and accepted meaning of the terms of the written contract.

On page 20 of our opening brief, we set forth the accepted rule that such declarations by one or both parties are entirely irrelevant. The authorities supporting the rule and cited by us are not mentioned by appellee in its brief. It may be assumed therefore not only the rule but the application thereof is undisputed and the liability of appellee is to be determined by the breach of the terms of the written contract, not by the declaration of appellee as to the meaning or its state of mind at the time the contract was made.

In the much cited case of *Eustis Mining Company v. Beer* (DF. N.Y., 1917), 239 F. 976, 984, Justice Learned Hand said:

> "It is quite true that we commonly speak of a contract as a question of intent, and for most purposes it is a convenient paraphrase, accurate enough, but, strictly speaking, untrue. It makes not the least difference whether a promisor actually intends that meaning which the law will impose upon his words. The whole House of Bishops might satisfy us that he had intended something else, and it would make not a particle of difference in his obligation. That obligation the law attaches to his act of using certain words, provided, of course, the actor be under no disability. The scope of those words will, in the absence of some convention to the contrary, be settled, it is true, by what the law supposes men would generally mean when they used them; * * * Hence it follows that *no declara-*

tion of the promisor as to his meaning when he used the words is of the slightest relevancy, however formally competent it may be as an admission. Indeed, if both parties severally declared that their meaning had been other than the natural meaning, and each declaration was similar, it would be irrelevant, saving some mutual agreement between them to that effect. *When the court came to assign the meaning to their words, it would disregard such declarations, because they related only to their state of mind when the contract was made, and that has nothing to do with their obligations.*" (Emphasis supplied)

In *Maryland Casualty Company v. United States* (8 C.A., 1948), 169 F.(2d) 102, 110, the court quoted the above language and said:

"'When a contract, complete in itself, fails to incorporate a previous oral agreement, then it must be presumed that the parties have purposely rejected the earlier oral agreement. * * * (citations) No rule concerning the interpretation of contracts is more firmly established than that which excludes the testimony of a party to a written contract than he intended to express a meaning contrary to that which the law imposes upon the language of the contract. * * * (citations) The court may not inquire into the secret or unexpressed intention of one or both of the parties.'"

Speaking on the subject in *Brown Bag Filling Company v. United S. & A. Company,* 107 Atl. 619 (Conn. —1919), the court said:

"* * * the meaning of a written contract is not to be determined by the relative ignorance or knowledge of the parties. * * *"

* * *

"And the court further referred to the conduct

> of the parties as tending to show their understanding of the contract. This was all quite foreign to the real issue with a contract in writing such as the present. Under the pleadings there was but one question. Did rod aluminum mean pure aluminum? Under the written contract it was quite immaterial whether the plaintiff knew or did not know of such special sense. The sale being of specific goods designated as 'rod aluminum' in the written contract as completed and in the written negotiations leading up to the contract, it was the duty of the plaintiff to furnish 'rod aluminum' as that term was ordinarily used in the trade. * * * "

Appellee failed in its brief to deal with the distinction between evidence which is admissible and relevant to show special circumstances under the second part of the rule of *Hadley v. Baxendale* and evidence which is inadmissible and irrelevant as tending to vary and contradict the terms of the written contract, discussed on pages 19 of our opening brief, which is a tacit admission of the soundness of appellant's position.

Appellee, at the bottom of page 13 of its brief states that the Washington cases cited by us are of "limited application" and do not "deal in any way with the admission or exclusion of parol or extrinsic evidence introduced for the purpose of assessing or determining the amount of damages sustained by plaintiff." On the contrary, all the Washington cases cited determined the damages plaintiff was entitled to recover.

For example in *Asbury v. Yakima Milling Co.* (1926) 137 Wash. 203, 242 Pac. 362, the court reversed the trial court on the question of damages as determined

by the trial court admitting and considering as relevant parol evidence in respect to the terms of the contract. The case was reversed for the reason that damages resulting from the breach of contract based on parol evidence to furnish alfalfa hay "93% pure green color" were not the same as damages for breach of the written contract for failure to furnish alfalfa hay "93% 1st cut." The "measure of damages" differ.

None of the authorities cited by appellee under this heading deal with the "parol evidence rule" or the point under consideration and we will not therefore burden the court with discussing them.

II. When Were Inspection Services Sought?

See appellee's brief, page 17; appellant's brief, page 28.

To establish its point, appellee has, unintentionally of course, taken advantage of a typographical omission to convey an untruth. On page 18, counsel quotes Mr. Gips as testifying: " * * * I informed him that we had obtained steel billets * * *."

What Gips stated, appears in the original transcript at page 142, "I talked to Mr. Clark and I informed him that *we had obtained an order from the New Zealand Government for steel billets.*" The line of words between "obtained" and "billets" were through printer's error, omitted in the printed record, and the court no doubt will order correction of the printed record. F.R.C.P. Rule 75(h).

Appellant's other point that the main purpose of hiring appellee was to be assured the steel billets or-

dered from Seattle Foundry would conform to the specifications of its New Zealand order go unchallenged.

III. Appellant's Cases and Authorities on Damages

See appellee's brief, pp. 20, 21; appellant's opening brief, pp. 28-37, inclusive.

Appellee would like to throw the blame for its faulty inspection on Seattle Foundry Company and have this court decide that appellant's damages resulted from liability of Seattle Foundry Company, whose liability is precluded by a dismissal with prejudice (R. 105).

Appellee's indirect approach is the proposition that appellant's authorities "would be particularly appropriate to sustain a recovery of damages in an action by appellant against Seattle Foundry Company"—a matter not in issue here. It should be noted, however, that a claim for damages was made by appellant against Seattle Foundry Company and denied for valid reasons in a letter (Ex. 71) dated November 20, 1953, where in denying liability, Seattle Foundry stated:

> "The testing laboratory hired by your company (appellant), Pittsburgh Testing Laboratories, was given full authority by you for final inspection, both chemically and physically. We were not allowed to ship any billets unless they had approved and stamped them. Our records show six complete heats scraped by them plus several individual billets because they did not meet specifications."

Appellant's authorities are most certainly in point.

Contrary to appellee's references there are no rules of damages peculiarly applicable to a contract of agency.[1]

In *Bank of North America v. Cooper,* 137 U.S. 473, 34 L.ed. 759, at page 762, it is said:

> "If positive instructions are disobeyed and loss results, *prima facie* liability for that loss ensues; and the burden is on the defendant, the disobeying agent, to prove that obedience would have brought a like result."

In an action against a marine surveyor for failure to properly survey a vessel being purchased by plaintiff, the defendant surveyor was held liable for breach of contract irrespective of negligence. *Bradshaw v. Monk* (Superior Ct. Wash.) 1952 A.M.C. 53. The court there stated:

> "The contract between the parties hereto was for a survey to determine the seaworthiness of the boat. Capt. Thomas failed to determine such fact, and the defendants are liable for breach of contract, irrespective of negligence * * * "

See also *American Bureau of Shipping v. Allied Oil Co.* (6 C.A. 1933) 64 F.(2d) 509, holding an inspection and classification agency liable for damages arising out of negligent performance of its contract to inspect and report upon the condition of a vessel being purchased by the plaintiff.

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[1] Vol. II Restatement of the Law of Agency, §400:

> "An agent who commits a breach of his contract with his principal is subject to liability to the principal in accordance with the principles stated in the Restatement of Contracts."

Comment:

> "b. Damages. In an action for a breach of contract, the agent is subject to liability for harm to the interests of the principal caused by the agent's failure to perform, and also for loss of profits which were reasonably to be anticipated and which would have been made had the promised service been performed. * * * "

IV. Appellee's Cases Are Not in Point

We have examined authorities cited by appellee and failed to discern that they have any application to the points presented.

In *Gagne v. Bertran* (1954) 43 Cal.(2d) 481, 275 P. (2d) 15, cited at page 26 of appellee's brief, defendant was employed to make test drills of soil on property plaintiff was about to purchase. It has no bearing on the question of damages for breach of contract as here where appellee not only agreed to make an inspection according to a certain standard of inspection, but also agreed to make a certification that the steel billets ordered by appellant would meet the specifications, and breached its contract in both respects. That was a California case. Action lies in Washington against an agent for breach of contract for failure to make proper inspection irrespective of negligence. *Bradshaw v. Monk,* 1952 A.M.C. 53.

Platts v. Arney, (1957) 150 Wash. Dec. 33, 309 P. (2d) 372 cited on page 23 of appellee's brief, has application to the facts of that particular case in which plaintiff *was allowed damages for the net gain he would have made except for breach of contract by defendant.* Authorities cited by the court included Williston on Contracts, §338, wherein the rule of damages is succinctly stated:

> "Compensation involves not only assessment of gains prevented by the breach *but also of losses ensuing which would not have occurred had the contract been performed."* (Emphasis ours) 5 Williston on Contracts, Rev. Ed., p. 3764.

Young v. Yates, (1922) 153 Minn. 366, 390 N.W. 791, is cited in appellee's brief at page 27, as governing the situation here. The circumstances of that case have no similarity to the case at bar. The court simply held that plaintiff had failed to prove damages.

First Nat. Bank of Mandan v. Larsson, (1937) 67 N.D. 243, 271 N.W. 289, cited in appellee's brief at page 28, involved a suit by a bank on a promissory note. Defendant defended on the ground that the plaintiff bank was his collecting agency and had failed to exercise good faith in the collection of a note put up with plaintiff bank as collateral for a loan. Defendant claimed an offset to the extent of the face value of the note placed with plaintiff for collection. As the note held by the bank for collection was not by the evidence shown to be non-collectible, the court held that the amount thereof was not *prima facie* evidence of defendant's actual loss. The court distinguished the case on the facts from *Commercial Bank v. Red River Valley National Bank,* 8 N.D. 382, 79 N.W. 859, where defendant bank was held liable as a collection agency for failure to follow instructions in collecting two notes left by the plaintiff for collection. The liability for damages was held to extend to the face amount of the notes, which the court held in the circumstances of that case to be *prima facie* evidence of plaintiff's loss.

There is some similarity in these two North Dakota cases to the case at bar. Appellant here is unable to recover damages against Seattle Foundry Company because of its agent's acts in approving and accepting on behalf of appellant material as conforming to the con-

tract specifications, and in failing to reject nonconforming material in breach of its duty. Appellee is responsible for appellant's loss by failing to follow instructions. Appellant's actual loss is *prima facie* evidence of its damages. The burden is on the appellee to show that such a loss would not have occurred if it had followed instructions.

Goddard v. Metropolitan Trust Co. of California, (C.C.A. 9, 1936) 82 F.(2d) 902, cited in appellant's brief at page 28 simply holds that the complaint failed to allege a cause of action by reason of uncertainty. The uncertainty was in failure to allege facts that defendant's failure to follow plaintiff's instructions in respect to a trust deed, resulted in damages to the plaintiff. The part appellee quotes from the case is applicable here in the reverse, where it has been conclusively shown that had appellee followed appellant's instructions, the loss to appellant would have been prevented, notwithstanding appellee's mere conclusion to the contrary.

V. Appellee Responsible for Loss

Appellee contends on pages 22-29 of its brief that appellant's damages were not caused by appellee's breach of contract. Its argument is based on the premises contained in the following assertion on page 22 of its brief:

> "Appellant knew that Seattle Foundry intended to supply appellant with cast steel billets in performance with this contract."

More accurately, appellant's information was that the steel billets ordered from Foundry were "cast billets

from sand molds," but appellant was likewise assured by Seattle Foundry that its proposal to furnish steel billets according to the standard ASTM-A-17/29 specification was in order (Findings of Fact VII, R. 85, 87) and the trial court found "until after the order was completed Grace's employees had no actual knowledge that billets produced by Foundry would not conform to ASTM-A-17/29 specifications" (R. 95). Moreover, the inspection contract assured appellant the material could be inspected and certified by appellee to conform to the standard ASTM specifications for steel billets.

When Seattle Foundry agreed to furnish steel billets according to the standard ASTM specifications, appellant assumed that it knew what it was doing. Information the billets would be cast steel in sand molds simply described the method of manufacture, not a deviation from the standard specification for steel billets. There was no reason for appellant to think or believe the steel billets would not be other than called for in the specifications. That appellant's lack of understanding that "cast" billets would not meet the standard specifications for steel billets was not cleared up in time to have prevented all its losses, was due wholly to the stupidity of appellees in not giving proper heed and advice in respect to Seattle Foundry's letter of May 16 (Ex. 23). See Findings of Fact X and XI (R. 92-95).

Desiring, as stated to be assured of mutual understanding as to the specifications, the appellant asked its inspection agency, the appellee, to confirm Seattle Foundry's understanding of them. The letter was forwarded to the San Francisco office and there Mr. Gips

called Mr. Clark on the phone and read the letter to him, and asked his advice in the matter. Clark, still acting under the assumption that the specifications called for castings, approved the proposed method of manufacture and replied that he would give their Seattle office all the information necessary to enable them to make the inspection; but added that there had been no "changes or amendments to the ASTM A-17/29 specifications," which clearly implied that Foundry's interpretation of them was correct (Findings of Fact XI, R. 94).

This incident conclusively confirms the court's finding that appellee went through the form of performing its contract without knowledge of the meaning of its terms. It would seem that this letter would have suggested to Mr. Clark, inasmuch as this specification was not in current use, to refer to the ASTM publication (appellee had it in his library, R. 482) to learn the meaning. Had he done so the whole situation would have been cleared up; Foundry being advised of the meaning of its contract would, presumptively, have set about its performance.

Appellee states (brief 24):

> "Appellant is seeking to force appellee to restore appellant to the position that appellant would have been in had Seattle Foundry supplied billets to appellant conforming to the New Zealand specifications."

That is exactly the situation. Because it is due wholly to the fault of appellee that we are not in that position.

Presumptively it would have been so assured be-

cause the presumption is that Foundry, correctly informed as to the requirements of the standard ASTM specifications for steel billets, would have performed it. In any event, we would not be out the $27,119.16 by reason of lack of "performance by appellee" we paid out for the manufacture, and $3,151.86 paid for testing or over $30,000 for castings having a value of approximately $7,000.00. Appellee argues that even if it had performed its contract, it would have made no difference as in any event, Foundry could not produce the billets. That is a fallacy. There was nothing in the contract to require that Foundry manufacture or produce the steel billets at its plant. See Foundry Contract, Exhibit 20, R. 86. It could have purchased them from Isaacson or elsewhere or provided a means of performance perhaps by arranging elsewhere for subsequent forging. Seattle Foundry, presumptively, was wholly solvent and capable of obtaining the steel billets elsewhere if necessary. Appellee's failure to reject and its approval of castings as steel billets, in any event prevented appellant from seeking its remedy against the manufacture.

On pages 29 to 32 of its brief, appellee argues that appellant's losses were *not supposedly* in the contemplation of the parties when the contract was made. As did the trial court, appellee relies upon the state of the mind of the parties at the time the contract was made as determined by inadmissible parol evidence.

At page 32, appellee states:

> "In appellant's reckless attempt to receive this extraordinary profit without the attendant risk, appellant conceived the idea, in effect, of *insuring*

> the risk by obtaining appellee's inspection services."

How true, but our insurance proved to be of no value.

It may be noted, too, that after payment of appellee's charges, the profit was not at all extraordinary.

At page 33, appellee states:

> "The trial court was convinced that both appellant and appellee knew at the time the inspection contract was made that the billets to be produced by Seattle Foundry would be cast steel billets."

But they equally knew the material ordered and to be inspected was steel billets according to the ASTM standard and only appellee was charged with knowledge the castings required subsequent rolling or forging, a matter concerning which appellant had no knowledge.

Appellee further states:

> "It is undisputed that cast steel billets would not comply with ASTM A-17/29 specifications because such billets have not been rolled or forged."

True again; but appellant did not know that fact, and was under no obligation to anybody to know it. On the other hand, appellee equally did not know that fact; but it was obligated to know it.

Appellee (brief 32) states that appellant did not give it information as to the details of the purchase order from New Zealand. That is not true. Clark admitted that Gips told him that the billets were for New Zealand and that the order was for 800 billets of various sizes all to be of ASTM A-17/29 specifications.

That certainly was all the information necessary for appellee to make the proper inspection and to know that appellant intended to make a profit on the transaction.

Appellee again states (brief 35):

> "Appellee was to inspect the product produced by Seattle Foundry."

That is but partially true, appellant was to inspect the material ordered from Seattle Foundry Company and produced there, which order as appellee well was aware under the terms of its contract, called for steel billets of standard ASTM specifications, and appellee was hired to see that the material furnished conformed to those specifications. It broke its promise to do so by approving and certifying castings as steel billets conforming to ASTM A-17/29 specifications.

In closing we quote again from Justice Brown in *Bank of North America v. Cooper,* 137 U.S. 473, 34 L.ed. 759, at page 762:

> "If positive instructions are disobeyed and loss results *prima facie* liability for that loss ensues; and the burden is on the defendant, the disobeying agent, to prove that obedience would have brought a like result."

The trial court has found that positive instructions were disobeyed and that loss in the sum of $21,747.24 has ensued. Has appellant proved to the satisfaction of this court that "obedience to those instructions would have brought a like result"?

CONCLUSION

It is respectfully submitted that the lower court committed reversible error as set forth in appellant's opening brief; that the judgment heretofore entered should be reversed and the case remanded with instructions to enter findings of fact and conclusions of law and judgment awarding appellant the sum of $21,747.24, with legal interest from August 26, 1954.

Respectfully submitted,

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